STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

DELANO HIGH SCHOOL TEACHERS ASSOCIATION, CTA/NEA,	)	
Charging Party,	)	Case No. LA-CE-1139
v.	)	PERB Decision No. 307
DELANO JOINT UNION HIGH SCHOOL DISTRICT,	)	May 5, 1983
Respondent.	)	

Appearances; Charles R. Gustafson, Attorney for Delano High School Teachers Association, CTA/NEA; Carl B. A. Lange, III, Representative (Schools Legal Service) for Delano Joint Union High School District.

Before Gluck, Chairperson; Tovar and Jaeger, Members.

DECISION

JAEGER, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the Delano High School Teachers Association, CTA/NEA (Association) to an administrative law judge's (ALJ) proposed decision dismissing charges alleging that the District violated subsections 3543.5(a), (b) and (c) of the Educational Employment Relations Act (EERA).[1]

[1]EERA is codified at Government Code section 3540 et seq. All references are to the Government Code unless otherwise indicated. In relevant part, section 3543.5 provides:

> It shall be unlawful for a public school employer to:

In its charge, the Association alleged that the District violated its duty to negotiate in good faith by refusing to negotiate the effects of its decision to lay off certificated employees. The ALJ found that the Association did not properly communicate its desire to negotiate the effects of the intended layoffs, thereby waiving its right to negotiate.

For the reasons set forth below, we affirm the ALJ's proposed decision, and dismiss the Association's charges.

FACTS

The District and the Association entered into a collective agreement on July 1, 1977, which was to expire on June 30, 1980.

On February 19, 1980, the Association presented its initial comprehensive proposal for a successor contract to the school board at the special public meeting.

On March 3, 1980, the school board adopted a resolution directing the superintendent to reduce certain services and to

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> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.
>
> (b) Deny to employee organizations rights guaranteed to them by this chapter.
>
> (c) Refuse or fail to meet and negotiate in good faith with an exclusive representative.
>
> . . . . . .

determine which employees' services might not be required for the 1980-81 school year. The Association became aware of that resolution soon thereafter.

On March 10, the Association delivered to the superintendent a list of 10 suggestions for the school board to consider prior to acting on any proposed layoffs.

The Association's March 10 communication reads as follows:

> TO: D.J.U.H.S.D. Board of Trustees
> FROM: Teachers Association
> DATE: 3/10/80
>
> As elected representatives of the community and agents of the state it behooves you to look at past mistakes honestly and fairly so responsibility can be properly placed. The Delano High School Teachers' Association offers the following prioritized list of events that should occur before dismissal of any teaching personnel or disruption of any program.
>
> 1. Terminate immediately, the employment of Mr. David Gallego, business manager, who according to the Kern County Superintendent's Office mismanaged the school's money. (Unanimous vote)
>
> 2. Terminate the employment of the superintendent <u>if he was responsible</u> for seeing to it that the asst. superintendent followed proper procedures.
>
> 3. Reduce the administrative staff by 50%.
>
> 4. Sell all unnecessary equipment.
>
> 5. <u>No</u> conferences or trips should be paid for out of the general fund.
>
> 6. Eliminate <u>all</u> food services.

7. All categorical programs should be 100% self-supporting and no money from the general fund should be used.

8. Reduction of maintenance and grounds crews, and warehouse staffs by 50%.

9. Reduction of business office staff by 50%.

10. Reduction of custodial staff by 10%. (Emphasis in the original.)

On March 11, 1980, the Association's contract proposal was formally sunshined. The Association did not request negotiations concerning the proposed layoffs at that time.

On March 12, 1980, the superintendent gave notice to 25 certificated employees of his recommendation to the school board that they not be reemployed for the next school year.

On March 17, 1980, the Association bargaining team gathered in the teachers' lounge. In an impromptu conversation with the superintendent, the Association president requested that negotiations begin immediately. The superintendent responded that they would not be starting that day. The Association president then told the superintendent that he thought that the current contract required negotiations to begin by that date. The superintendent responded by stating that if the Association felt that the District had violated the contract it should file a grievance.

At a special meeting of the school board on March 18, 1980, the Association's proposal was again put on the agenda for

receipt of public comment. The Association did not request negotiations on the effects of layoff at that time.

The District presented its initial proposal for a successor contract at the regular public meeting of the school board on April 8, 1980.

On April 28, negotiations began on the Association's successor proposal.

On May 12, 1980, the school board met and took action directing the superintendent to give notice of its decision to lay off 20 of the 25 employees originally noticed on March 12, 1980.

On May 13, 1980, the superintendent gave the affected employees the official notice that their services would not be required commencing with the 1980-81 school year.

The president of the Association, Dwaine Rose, testified that the Association's comprehensive proposal, which was originally presented to the District in February 1980, did not refer to layoffs and that, between March 3 and the beginning of negotiations on April 28, the Association did not modify the proposal to request negotiations concerning the effects of the layoffs. He further testified that, after April 28, the Association did not request negotiations concerning the layoffs because, in his opinion, "it was all over" and negotiations would be futile.

It was stipulated that the layoff of 20 teachers would have the following effects on the teachers who remained for the following year:

1. The class size for the next school year would be increased by 32 percent.
2. Counseling duties would be increased or counselor workload would be increased.

DISCUSSION

The only issue in this case is whether the Association's communications with the District constituted a proper request to negotiate the impact of the District's decision to lay off certificated employees.[2]

In Newman-Crows Landing Unified School District (6/30/82) PERB Decision No. 223, the Board held that "although it is not essential that a request to negotiate be specific or made in a particular form . . . it is important for the charging party to have signified some desire to negotiate. . . ." Al Landers Dump Truck, Inc. (1971) 192 NLRB 207 [77 LRRM 1729]; Schreiber Freight Lines (1973) 204 NLRB 1162 [83 LRRM 1612]; NLRB v. Columbian Enameling and Shaping Co. (1939) 206 U.S. 292 [4 LRRM

[2]In Newark Unified School District (6/30/82) PERB Decision No. 225, the Board found that the decision to lay off certificated employees is outside of the scope of representation. Nevertheless, the Board held, and we reiterate, that an employer has a duty to negotiate the impact of layoffs on bargaining unit members.

524]. Thus, the determination as to whether a particular communication constitutes a proper request to negotiate is a question of fact to be determined on a case-by-case basis. Newman-Crows Landing Unified School District, supra.

The Association argues that the letter of March 10, the request to address the school board on March 12, the discussion with the superintendent on March 17, and the charge itself filed on April 11, 1980, constituted sufficient notice of the Association's desire to negotiate the effects of the District's decision to lay off.

March 10 Communication

The March 10 communication contains, in its own words, a "prioritized list of events that should occur before dismissal of any teaching personnel or disruption of any program." The ALJ characterized the demands contained therein as essentially "political" in nature and outside of the scope of representation.3

We agree with the ALJ that the communication of March 10 does not constitute a proper request to negotiate. Nowhere in the March 10 communication does the Association give the

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[3]We need not consider the question of whether the specific demands set forth in the March 10 communication are within the scope of representation, since we conclude, infra, that the Association made no request to negotiate on March 10.

slightest indication that it wishes to meet and discuss the District's contemplated layoffs. Rather, the demands specified in the document are phrased essentially as a protest of the District's actions. As such, the March 10 communication cannot be fairly construed as having put the District on notice that the Association desired to negotiate the effects of the layoffs. Newman-Crows Landing Unified School District, supra.

Our finding is consistent with the position of the National Labor Relations Board, which has long held that a union waives its right to bargain where it merely "protests" an employer's contemplated unilateral actions, but makes no meaningful attempt to request negotiations. American Buslines, Inc. (1967) 164 NLRB 1055 [65 LRRM 1547]; Medicenter, Mid-South Hospital (1975) 221 NLRB 670 [90 LRRM 1576]; Clarkwood Corp. (1977) 233 NLRB 1172 [97 LRRM 1034]; Citizens National Bank of Willmar (1979) 245 NLRB 389 [102 LRRM 4067]; Ciba-Geigy Pharmaceuticals Division (1982) 264 NLRB No. 134 [111 LRRM 1460].[4] As the NLRB stated in Clarkwood Corp., supra, 233 NLRB at 1172:

> [A] union which receives timely notice of a change in conditions of employment must take advantage of that notice if it is to preserve its bargaining rights and not be

[4]It is appropriate for the Board to take guidance from federal labor law precedent when applicable to public sector labor relations issues. Firefighters v. City of Vallejo (1974) 12 Cal.3d 608 [116 Cal.Rptr. 507].

> content in merely protesting an employer's contemplated action. Such lack of diligence by a union amounts to a waiver of its right to bargain. . . .

March 11 School Board Meeting

Association President Rose testified that on March 11, prior to the school board meeting, he handed the superintendent the Association's comprehensive proposal and asked "to meet with the Board." He made no mention of the intended layoffs, and no one representing the Association spoke at the school board meeting that night.

This evidence suggests no attempt on the part of the Association to request negotiations concerning the effects of the layoffs.

March 17 Conversation

On March 17, members of the Association's bargaining team gathered in the teachers' lounge to request that negotiations begin that day. Association President Rose testified that the following conversation occurred between him and the superintendent:

> Q. All right. And what occurred when the teachers were waiting there ready to begin negotiations on March 17th?
>
> A. I happened to be walking through the district office, and the superintendent asked me if he could see me for a moment. And so I went into his office, and I don't remember what we were talking about, but, mentioning the negotiations starting that day came up, and he said that negotiations would not be starting that day.

Q. Did he give a reason why?

A. No.

Q. Did you indicate to him at that time whether or not the association was ready to begin negotiations?

A. Yes, and indicated it was part of the contract that we do that.

Q. And was there any discussion with the district as to when negotiations would begin?

A. No. He said that if we felt like that was a violation of the contract to file a grievance.

Q. And did the association file a grievance?

A. No. It would take much too long to do that.

Thus, there is no evidence in the record as to whether the Association was requesting to negotiate about the successor contract proposal or about the effects of the contemplated layoffs on March 17. In the absence of even the slightest testimony indicating that layoffs were mentioned in the March 17 conversation, we cannot conclude that it constituted a proper request to bargain.

Filing of the Charge

Finally, the Association asserts, without any legal justification, that the filing of this charge constituted a valid request to negotiate.

This assertion is without merit. The filing of an unfair practice charge alleging a refusal to negotiate in good faith is not a request to bargain but, rather, an assertion that an

employer has failed to negotiate in good faith in the past. The filing of the charge cannot itself trigger a duty to negotiate if the employer had no preexisting obligation to bargain. Whether a bargaining obligation existed prior to the filing of the charge is a matter to be determined at a hearing on the merits and is, in no way, established by the charge itself. See American Buslines, Inc., supra.

ORDER

Upon the foregoing facts, conclusions of law, and the entire record in this matter, the Public Employment Relations Board ORDERS that the unfair practice charge in Case No. LA-CE-1139 is DISMISSED.

Chairperson Gluck and Member Tovar joined in this Decision.